#S-9 **signed 6-8-04**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
ILLIG INDUSTRIES, INC.,	**CASE NO. 01-20189-7**
	CHAPTER 7
DEBTOR.	
DAVID SEITTER, Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 03-6015**
GUILFORD MILLS, INC.,	
DEFENDANT.	
In Re:	
EXCEL LAMINATES, INC.,	**CASE NO. 01-20190-7**
	CHAPTER 7
DEBTOR.	
DAVID SEITTER, Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 03-6033**
GUILFORD MILLS, INC.,	
DEFENDANT.	

ORDER (1) DENYING RECONSIDERATION OF MAY 17, 2004, ORDER DENYING STAYS, AND (2) DENYING MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

These proceedings are before the Court on a motion filed by defendant Guilford Mills, Inc. ("Guilford"), on May 27, 2004, seeking (1) reconsideration and amendment of the May 17 Order denying its request to stay both proceedings, or (2) in the alternative,

leave to file an interlocutory appeal. Guilford appears by counsel Nancy S. Jochens and Scottie S. Kleypas of Blackwell Sanders Peper Martin LLP. Plaintiff-Trustee Carl R. Clark, successor trustee to David C. Seitter, has not yet filed a response to the motion, but the Court concludes that it can deny the motion without waiting for a response. The Court has reviewed Guilford's original motions, the Trustee's responses, and Guilford's replies, the May 17 Order, and Guilford's motion for reconsideration, and is now ready to rule.

The Court already set out the relevant facts in the May 17 Order and will not repeat them here. The only new factual matter Guilford now presents is a complete copy of its Chapter 11 plan of reorganization and the order confirming its plan. Based on language in those documents, Guilford argues that the New York bankruptcy court that confirmed its plan has exclusive jurisdiction to determine whether the Trustee's claims against Guilford were discharged by the plan's confirmation.

Guilford seems to suggest that paragraph GG(i) of the order confirming its plan retained exclusive jurisdiction post-confirmation of all matters covered by the jurisdiction conferred by 28 U.S.C.A. § 1334(a), (b), (d), and (e), including the injunction and discharge provisions contained in Articles XII and XIII of its plan. If this is what Guilford intends, it has misread the order. All the paragraphs of the order labeled with capital letters, beginning with A on page 2 and continuing to JJ on page 11, are findings made by the bankruptcy court. So when paragraph GG(i) states, "Each of the discharge and injunctive provisions of Article XII and XIII of the Plan: (i) falls within the jurisdiction of this Court under 28 U.S.C. § 1334(a), (b), (d) and (e)," it is referring to the circumstances leading up to

confirmation. It is not declaring that the court is retaining all the jurisdiction that authorized it to consider and confirm Guilford's plan. Instead, the provisions that constitute the relief the court was ordering are labeled with numbers, beginning with paragraph 1 on page 11 and continuing to paragraph 41 on page 30.

In paragraph 36 of the relief provisions contained in the confirmation order, the New York bankruptcy court retained jurisdiction "for all purposes permitted under applicable law, including, without limitation, the purposes specifically set forth in Article XV of the Plan." This Court finds nothing else in the confirmation order identifying any jurisdiction that the New York court retained. Article XV of the plan more completely describes the jurisdiction the New York court retained after the effective date of Guilford's plan (the effective date would have been about October 1, 2002), using these words:

> As of the Effective Date, the Bankruptcy Court shall retain jurisdiction, and *if the Bankruptcy Court exercises its retained jurisdiction, shall have exclusive jurisdiction*, of all matters arising out of, and relating to, the Reorganization Case and this Plan pursuant to, and for the purposes of, sections 105(a) and 1142 of the Bankruptcy Code.[1]

The emphasized language indicates that the plan is not identifying any retained jurisdiction that is automatically exclusive, but instead specifying retained jurisdiction that becomes exclusive only when the court exercises it. The plan provision clearly contemplates that another court could have concurrent jurisdiction over questions that it might cover.

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[1]Amended Joint Plan of Reorganization at 36, provision 15.1, Retention of Jurisdiction (emphasis added), attached as Exhibit A to Guilford's Motion for Reconsideration.

Guilford suggests that the New York court obtained exclusive jurisdiction of the discharge question by setting a hearing date and objection deadline on a motion that Guilford filed there on April 16, 2004. But, as was pointed out in the May 17 Order, and as Guilford admitted in the answers it filed in these proceedings, this Court has jurisdiction of the subject matter of the discharge question, and the Court obtained jurisdiction of both parties to these proceedings no later than March 28, 2003, when Guilford filed its answers, long before it filed its motion in New York. In *O'Hare International Bank v. Lambert*, the Tenth Circuit said, "It is well established in this Circuit that where the jurisdiction of a federal district court has first attached, that right cannot be arrested or taken away by proceedings in another federal district court."[2] Even if the New York court might be thought to have exercised the jurisdiction it retained under Guilford's plan simply by setting an objection deadline and hearing date, Guilford's New York motion was filed too late to take away this Court's jurisdiction of the discharge question and bring it within the New York court's exclusive jurisdiction.

Guilford claims that only the equitable doctrine of laches might have justified this Court's suggestion that Guilford's failure for more than a year to seek to raise the discharge question in the New York court affected the Court's willingness to consider staying these proceedings. As stated in *Jicarilla Apache Tribe v. Andrus*, the only case Guilford cites on this point, "Laches may be found, however, where a party, having

[2]459 F.2d 328, 331 (10th Cir. 1972); *see also* 28 U.S.C.A. § 151 (bankruptcy courts are units of district courts).

knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own. [Citation omitted.] A party must exercise reasonable diligence in protecting his rights. [Citation omitted.]"[3] Certainly, if Guilford would have had any right to require the Court to stay these proceedings until the New York court decided the discharge question, it acquiesced for an unreasonable length of time by litigating the question, along with many others, before this Court for over a year. More importantly, though, the Court is convinced that at least once Guilford filed its answers here, it had no right to obtain a stay of these proceedings. Instead, Guilford's right was limited to the right to ask the Court to exercise its discretion to defer that question to the New York court. Of course, Guilford's unexplained delay in asking the Court to exercise that discretion could also, as it did, have an effect on the Court's ruling on the request.

To support its laches argument, Guilford also cites *Hawxhurst v. Pettibone Corporation*.[4] But in that case, the question was whether laches should bar a prepetition creditor from suing the reorganized debtor nominally in order to establish the creditor's right to recover from a third party, the debtor's insurer — that is, whether laches barred the substance of the claim. Here, the question is not whether Guilford's delay should bar the substance of its discharge defense. On the contrary, Guilford has timely asserted the defense here, and the question will be resolved in the proceedings before this Court. Guilford's delay in asking to have the discharge question decided by the New York court,

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[3]687 F.2d 1324, 1338 (10th Cir. 1982).

[4]40 F.3d 175, 181-82 (7th Cir. 1994).

together with its concessions in its answers that this Court has jurisdiction of the subject matter and personal jurisdiction over it in these proceedings, and its active participation in the litigation here for more than a year, have merely convinced this Court that the discharge question should be resolved here, rather than in a newly-instituted proceeding in New York. All Guilford has lost is the chance, as a matter of procedure, to have the New York court, rather than this Court, decide the question.

The Court is rather astonished to have Guilford suggest now — after it defended these cases up to the time when final pretrial orders were due, with no mention of the need to avoid needless litigation costs through an early ruling on the "threshold question" whether the Trustee was a known creditor — that unnecessary litigation costs will be avoided if these proceedings are stayed and the parties are sent to New York to litigate the discharge question. If needless litigation costs were such a concern to Guilford, why didn't it file early motions to dismiss or for summary judgment on the discharge question? If for some reason the question needed to be decided by the New York court, why didn't Guilford seek relief there as soon as it learned the Trustee might assert these claims against it, or at least once the Trustee did sue it here? The Court can only guess that Guilford was content to litigate in Kansas, represented by Kansas City lawyers who probably charge substantially less than New York lawyers, until something changed that Guilford has not revealed to the Court.

In response to Guilford's original motion, the Trustee speculated that Guilford wants to rely on a ruling by a bankruptcy judge in the Southern District of New York, other

than the one who presided over Guilford's bankruptcy case, that may be favorable to it.[5] Maybe that is so. The Court would note, however, that while courts disagree about the binding effect a decision by one of a number of district judges in a district has on bankruptcy judges in that district,[6] the Court is aware of no authority suggesting that a decision by one bankruptcy judge is binding on other bankruptcy judges in the same district. Since any such decision would be nothing more than persuasive authority before the New York bankruptcy judge that presided over Guilford's case, so far as this Court is aware, the decision would be as likely to be persuasive here as before that judge in New York.

There can be no doubt that the Trustee's claims are, as Guilford argues, barred by the confirmation of its Chapter 11 plan if the Trustee is bound by the plan.[7] But the Trustee has asserted a defense — insufficient notice — that will, if it succeeds, mean that he is not bound by the plan.[8] Guilford even concedes that such a defense exists; it merely contests

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[5]*See In re XO Communications, Inc.*, 301 B.R. 782 (Bankr. S.D.N.Y. 2003).

[6]*Compare City of Olathe v. KAR Development Assocs., Ltd. (In re KAR Development Assocs., Ltd.)*, 180 B.R. 629, 640 (D.Kan. 1995) (Van Bebber, J.) (bankruptcy judges not bound by single district judge's decision in multi-judge district because district judges not bound by one another's decisions); *Jones v. Novastar Mortgage, Inc. (In re Jones)*, 298 B.R. 451, 460-61 (Bankr. D. Kan. 2003) (same); *Barnett v. Jamesway Corp. (In re Jamesway Corp.)*, 235 B.R. 329, 336 n.1 (Bankr. S.D.N.Y. 1999) (same), *with Irr Supply Centers, Inc. v. Phipps (In re Phipps)*, 217 B.R. 427, 429-32 (Bankr. W.D.N.Y. 1998) (bankruptcy judges in district are bound by published decision of single district judge in multi-judge district); *Health Servs. Credit Union v. Shunnarah (In re Shunnarah)*, 273 B.R. 671, 672-73 (M.D. Fla. 2001) (adopting reasoning of *Irr Supply*); *see also Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ("[T]here is no such thing as "the law of the district," citing numerous cases in n. 7).

[7]*See* 11 U.S.C.A. § 1141(d)(1)(A).

[8]*See Dalton Development Project #1 v. Unsecured Creditors Committee (In re Unioil)*, 948 F.2d 678, 682-84 (10th Cir. 1991) (claims based on postpetition, preconfirmation transfers not barred due to insufficient notice); *Reliable Electric Co., Inc., v. Olson Constr. Co.* 726 F.2d 620, 622-23(10th Cir. 1984) (prepetition claim not barred due to insufficient notice); *Christopher v. Kendavis Holding Co. (In*

whether the Trustee is protected by it. The provisions in the plan and the confirmation order declaring that all prepetition claims are discharged and enjoining postconfirmation efforts to enforce such claims are relevant only if the Trustee's insufficient-notice defense fails.

Besides arguing this Court is required to stay these proceedings, Guilford asserts that this Court should defer to the New York bankruptcy court on the discharge question as a matter of comity, citing the Fifth Circuit's decision in *Cadle Company v. Whataburger of Alice, Inc.*.[9] But that case actually supports this Court's May 17 Order. *Cadle* involved the "first-to-file" rule, which, according to the Fifth Circuit, provides: "when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap."[10] Guilford seems to believe that its bankruptcy case constitutes the first-filed case involving the discharge

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re Kendavis Holding Co.), 249 F.3d 383, 385-88 (5th Cir. 2001) (claim for pension benefits not discharged by Chapter 11 confirmation despite claimant's knowledge that bankruptcy case was pending because debtor owed fiduciary duty to beneficiaries of pension plan when it sought to terminate the plan to recoup surplus funds, and it sent claimant letter assuring him pension benefits would not be jeopardized by termination of pension plan); *Berger v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 96 F.3d 687, 689-90 (3d Cir. 1996) (prepetition claims not known to debtor were discharged by confirmation order despite lack of notice to claimants, but postpetition claims known to debtor were not); *Chemetron Corp. v. Jones*, 72 F.3d 341, 345-49 (3d Cir. 1995) (if claimants had been known creditors, due process would have required actual notice before Chapter 11 confirmation could bar them, but since they were unknown creditors, publication notice was sufficient to make confirmation discharge their claims); *see also Jones v. Chemetron Corp.*, 212 F.3d 199, 209-10 (3d Cir. 2001) (claimant not born until after Chapter 11 confirmation cannot be barred by the confirmation); *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 515-19 (5th Cir. 1994) (postpetition claims barred by confirmation of Chapter 11 plan because claimants had notice of pending bankruptcy case and sufficient knowledge to impose duty on them to protect their rights in bankruptcy court).

[9]174 F.3d 599, 603 (5th Cir. 1999).

[10]174 F.3d at 603 (citations omitted).

question. This is wrong. Guilford's entire bankruptcy case is simply too broad a proceeding to qualify as the first-filed case under *Cadle*. Guilford's approach would mean that any dispute that might ever arise concerning its plan or the order confirming it must be considered to be already pending before the New York bankruptcy court, even when, as the Trustee alleges here, Guilford's opponent was a known prepetition creditor to whom Guilford gave no notice of its bankruptcy case or significant events occurring in it. Instead, the first-filed case must be more narrowly defined. The question whether the Trustee's claims are barred by Guilford's confirmed plan was first raised in any court by the answers Guilford filed before this Court. For purposes of the first-filed rule, those answers made this Court the one where the dispute about that question was first filed. *Cadle* indicates that the court where a dispute is first filed should ordinarily proceed to resolve the dispute, and holds that the second court where the dispute is filed should not consider the first court's jurisdiction in deciding whether to exercise its discretion, in the interests of comity and sound judicial administration, to refuse to hear the matter.[11] If the discharge question involved an interpretation of something ambiguous or unclear in Guilford's plan or the order confirming it, Guilford's argument would be more convincing, although Guilford's substantial delay in seeking a New York ruling on the question would still weigh heavily against deferring to the New York court. But none of the provisions of the plan or confirmation order can have any effect on the question whether the notice given to the

[11]174 F.3d at 603-06.

Trustee was constitutionally insufficient to permit the plan and confirmation order to be binding on him.

For these reasons, the Court declines to alter its May 17 Order, and hereby denies Guilford's motion for reconsideration.

Guilford also asks the Court to grant leave to appeal the May 17 Order and this order pursuant to 28 U.S.C.A. § 158(a)(3). That provision authorizes district courts to grant leave to appeal interlocutory orders of bankruptcy judges:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
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> . . .
>
> (3) with leave of the court, from other interlocutory orders and decrees;
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> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

While the peculiarities of bankruptcy jurisdiction frequently call for this Court to exercise authority that statutes expressly confer on the district courts, granting leave to appeal an interlocutory order is not something the Court can do. A careful reading of § 158(a)(3) suggests that the district court, not this judge, must grant such leave. Federal Rules of Bankruptcy Procedure 8001(b), 8002(a), and 8003(a), (b), and (c) make relatively clear that it is the district court or the bankruptcy appellate panel[12] that decides whether to permit an interlocutory appeal. As a leading bankruptcy treatise states: "Final orders are appealable as of right; interlocutory orders are appealable with the consent of the appellate

[12]*See* 28 U.S.C.A. § 158(b) and (c). The Tenth Circuit has established a bankruptcy appellate panel.

tribunal."[13] Because the Court is not authorized to grant the alternative relief that Guilford seeks, that part of Guilford's motion is denied as well.

IT IS SO ORDERED.

Dated this _____ day of June, 2004.

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DALE L. SOMERS
BANKRUPTCY JUDGE

[13] 1 *Collier on Bankruptcy* ¶ 5.01 (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2004).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above **ORDER (1) DENYING RECONSIDERATION OF MAY 17, 2004, ORDER DENYING STAYS, AND (2) DENYING MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL** were mailed via regular U.S. mail, postage prepaid, on the _____ day of June, 2004, to the following:

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